



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 19, 2004

Ms. Rachael Maresh Finely  
Law Offices of Robert E. Luna, P.C.  
4411 North Central Expressway  
Dallas, Texas 75205

OR2004-8879

Dear Ms. Finely:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211228.

The Coppell Independent School District (the "district"), which you represent, received a request for written correspondence between the district and this office from May 12, 2004 through July 28, 2004. You state that the district will release some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information you seek to withhold in the present request is specifically excluded by the precise language of the request. You argue that portions of the information that you originally labeled as Exhibit B, in regards to Open Records Letter No. 2004-5909 (2004), titled "Parent and Student Names," are excepted from disclosure under sections 552.101 and 552.114. However, as you note in your August 18, 2004 letter to this office, the requestor has excluded from the present request "the particular records at issue" that this office ruled on in Open Records Letter No. 2004-5909. Accordingly, none of the documents that we ruled on in Open Records Letter No. 2004-5909 are responsive to the present request and need not be released to the requestor in response to this ruling.

You claim that the responsive portions of Exhibit B are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. Section 552.114 excepts from

disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Because none of the responsive portions of Exhibit B directly relate to a student, none of the information is confidential under FERPA.

You also claim that the responsive portions of Exhibit B are confidential attorney-client communications under rule 503 of the Texas Rules of Evidence and therefore may be withheld under section 552.101 of the Government Code.<sup>1</sup> Information protected by the attorney-client privilege, but not subject to section 552.022 of the Government Code, is excepted under section 552.107 of the Government Code, which is the proper exception to raise for this type of information.<sup>2</sup> Open Records Decision No. 676 at 7-8 (2002). Your argument for these responsive portions of Exhibit B will, therefore, be addressed under section 552.107 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

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<sup>1</sup>Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

<sup>2</sup>Section 552.022 of the Government Code specifies 18 categories of information that are subject to required public disclosure, unless the information is expressly made confidential under other law or, under section 552.022(a)(1), is excepted from disclosure under section 552.108. *See* Gov't Code § 552.022(a)(1)-(18).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made for the purpose of facilitating the rendition of professional legal services to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The responsive portions of Exhibit B consist of the request for information that this office addressed in Open Records Letter No. 2004-5909 and two letter briefs to this office from the district; one dated May 12, 2004 and one dated May 13, 2004. Because this office does not share an attorney-client relationship with the district and this office is not “another party in a pending action [that shares a] common interest” with the district, we find that these documents are not protected by the attorney-client privilege. *See* Tex. R. Evid. 503(b)(1) (defining parties to whose communication privilege can attach), 511(1) (person waives privilege if person, while holder of privilege, voluntarily discloses any significant part of privileged matter); *see also Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Carmona v. State*, 947 S.W.2d 661, 663 (Tex. App.—Austin 1997, no writ); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ); *State v. Peca*, 799 S.W.2d 426, 431 (Tex. App.—El Paso 1990, no writ); Open Records Decision No. 630 at 4 (1994) (discussing waiver of attorney-client and work product privileges). Thus, none of the responsive portions of Exhibit B may be withheld pursuant to

section 552.107. As you make no other arguments against disclosure, the district must release the responsive portions of Exhibit B to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

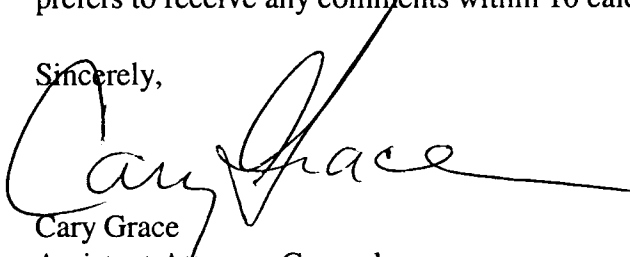
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 211228

Enc. Submitted documents

c: Mr. Arthur H. Kwast  
P.O. Box 1397  
Coppell, Texas 75019-1397  
(w/o enclosures)